

UNITED STATES COURT OF APPEALS

MAY 5 1997

TENTH CIRCUIT

PATRICK FISHER
Clerk

ROBERT P. JONES and DONNA M.
JONES,

Petitioners,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

No. 96-9014
(Docket No. 5043-94)
(United States Tax Court)

ORDER AND JUDGMENT*

Before ANDERSON, HENRY, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Therefore, the case is ordered submitted without oral argument.

Petitioners Robert P. Jones and Donna M. Jones, appearing pro se, appeal the Tax Court's decision that monies Robert Jones received in settlement of an Age Discrimination in Employment Act claim, 29 U.S.C. § 621 *et seq.*, are taxable and not excludable from taxable income under 26 U.S.C. § 104(a)(2).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

This issue was resolved in Commissioner v. Schleier, 115 S. Ct. 2159 (1995). In Schleier, the Supreme Court held there are two independent requirements a taxpayer must meet before a recovery is excludable under § 104(a)(2): "First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is 'based upon tort or tort type rights'; and second, the taxpayer must show that the damages were received 'on account of personal injuries or sickness.'" 115 S. Ct. at 2167. The Court held a settlement under the Age Discrimination in Employment Act does not satisfy either requirement and no part of the settlement was excludable under § 104(a)(2). See Gray v. Commissioner, 104 F.3d 1226, 1227 (10th Cir. 1997).

The judgment of the Tax Court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Mary Beck Briscoe
Circuit Judge